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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 190

E. E. MORGAN COMPANY,

Appellant,

vs.

STATE OF ARKANSAS, FOR THE USE AND BENEFIT OF PHILLIPS COUNTY,

Appellee.

STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES UPON APPEAL TO REVIEW JUDGMENT OF THE SUPREME COURT OF ARKANSAS.

Petitioners, E. E. Morgan Company and United States Fidelity & Guaranty Company, submit in compliance with Rule 12 of the Supreme Court of the United States, the following statement of the basis upon which they contend that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Arkansas in above entitled cause.

A.

Statutory Provision Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 237, amended, Judicial Code, 28 U. S. C. A., Section 344.

B.

Statutes of the State of Arkansas the Validity of Which is Drawn in Question.

The statutes of the State of Arkansas the validity of which is drawn in question, are Section 2251 and Sections 2247, 2248, 2249, and 2250 of Pope's Digest of the Statutes of Arkansas.

Section 2251 is as follows:

"*Penalty for Failure to File Articles.*

"Any foreign corporation which shall fail to comply with the provisions of this Act, and shall do any business in this State, shall be subject to a fine of not less than $1,000.00, to be recovered before any Court of competent jurisdiction, and all such fines so recovered shall be paid in to the general revenue fund of the County in which the cause of action shall accrue and it is hereby made the duty of the prosecuting attorneys to institute said suits in the name of the State, for the use and benefit of the County in which the suit is brought, and such prosecuting attorney shall receive as his compensation one-fourth of the amount recovered; and as an additional penalty, any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid cannot make any contract in this State which can be enforced by it either in law or in equity; and the complying with the provisions of this act after the date of any such contract, or after any suit is instituted therein, shall in no way validate said contract."

Section 2247:

"*Authority to Do Business.*

"Every company or corporation incorporated under the laws of any other State, Territory or Country, including

foreign railroad and foreign fire and life insurance companies, now or hereafter doing business, (a) in this State, shall file in the office of the Secretary of State of this State a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served (b)."

Section 2248:

"*Filing Resolution of Board of Directors.*

"Before authority is granted to any foreign corporation to do business in this State, it must file with the Secretary of State a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Secretary of State of this State, in any action brought or pending in this State, shall be a valid service upon said Company; and if process is served upon the Secretary of State it shall be his duty to at once send it by mail, addressed to the Company at its principal office."

Section 2249 which relates to the rights and liabilities of foreign corporations upon complying, and Section 2250 which provides for service of process upon auditor of State where no agent for service is designated under Section 2248 are not necessary to the determination of the question presented and are not for that reason set out verbatim.

C.

Date of Judgment and Application for Appeal.

The judgment of the Supreme Court of Arkansas sought to be reviewed, was entered on the 5th day of May, 1941,

and application for appeal together with this Statement of Jurisdiction was presented on the 31st day of May, 1941.

D.

Nature of the Case and Ruling of the Supreme Court of Arkansas.

Suit was brought in the Circuit Court of Phillips County, Arkansas, in the name of the State of Arkansas, for the use and benefit of Phillips County, against E. E. Morgan Company, a foreign corporation under said Section 2251 to recover a penalty or fine of $3,000.00 for having done business in Phillips County, Arkansas, without having complied with said Sections 2247, 2248, 2249, and 2250.

Morgan Company answered admitting that it was a foreign corporation, a corporation under the laws of Mississippi domiciled at Jackson in that State and that it had done business in Phillips County, Arkansas, without having complied with said Statutes, by stating that the business done therein consisted in the construction of a levee in the White River Levee District, for the United States, under contract with the United States, let pursuant to an Act of Congress approved May 15, 1928, the United States through its district engineer having advertised for bids therefor, that Morgan Company had mailed its bid from its office at Jackson, Mississippi, to said engineer at Memphis, Tennessee, that the engineer having accepted its bid, had mailed a contract to it, which it had signed and returned by mail to said engineer at Memphis, and that it thereafter had entered upon and done said work in Arkansas and that said Statutes could not be applied to it and it could not be fined thereunder for having done said work without violating the Commerce Clause and the Due

Process Clause of the Fourteenth Amendment to the Constitution of the United States and the right which the United States gave it and warranted to it.

Plaintiff demurred to defendant's answer on the ground that it stated no defense.

The Circuit Court sustained the demurrer and defendant declining to plead further, entered judgment against it for $1,000 with 6% interest from that date (October 19, 1940) until paid and costs. Defendant, Morgan Company, appealed from that judgment with United States Fidelity & Guaranty Company as surety upon its supersedeas appeal bond, to the Supreme Court of Arkansas, and assigned as errors for the reversal of the judgment, in substance and effect, that the construction put upon the Statutes making them applicable to it and its work made them repugnant to the Commerce Clause of the Constitution of the United States and said Act of Congress enacted thereunder, and that construction and the fining of appellant thereunder made them repugnant to the Due Process Clause of the Constitution, and denied it a right which the Federal Government gave it and warranted to it.

The Supreme Court of Arkansas held that said Statutes so construed were not repugnant to the Commerce Clause of the Constitution and the Act of Congress enacted thereunder and the Due Process Clause of the Fourteenth Amendment of the Constitution and affirmed the Circuit Court's judgment as will more fully appear from the copy of the Court's opinion which will be annexed hereto when this is printed, and entered its said judgment against appellant, Morgan Company, and its surety, United States Fidelity & Guaranty Company.

E.

Cases Sustaining Jurisdiction of the Supreme Court of the United States.

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States to review upon Appeal the judgment of the Supreme Court of Arkansas: *Pembina Consolidated Silver Mining and Milling Company* v. *Pennsylvania,* 125 U. S. 181, 31 L. Ed. 650; *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305, 36 L. Ed. 164; *Johnson* v. *Maryland,* 254 U. S. 51, 65 L. Ed. 126. See, also, *Osborne* v. *Bank,* 9 Wheaton 738, 868, 6 L. Ed. 234.

(S.) Brewer & Cracraft,
Hall & Hall,
By Wm. M. Hall,
Counsel for Petitioners (Appellants).

EXHIBIT "A".

IN THE SUPREME COURT OF ARKANSAS, MAY 5, 1941.

No. 242.

E. E. MORGAN CO., INC.

v.

STATE.

McHANEY, *J.*:

This is an appeal from a judgment for a $1,000 penalty against appellant, a foreign corporation, for doing business in this state without complying with statutes relating thereto, §§ 2247 to 2250, inclusive, of Pope's Digest. The complaint alleged and the answer admitted the doing of business in this state without such compliance, but the defense was that the only business transacted in this state consisted in the construction of a levee in the White River Levee Drainage District, under a contract with the United States, let pursuant to the Act of Congress approved May 15, 1928, 45 Stat. 534, chap. 569; that the United States, through its District Engineer, had advertised for bids for doing said work; that it had mailed a bid from its office in Jackson, Mississippi, to said engineer at Memphis, Tennessee, which bid was accepted; that said engineer mailed to it a contract, which it signed and returned to said engineer at Memphis by mail; and that it thereafter entered upon such construction work in Arkansas. It, therefore, alleged that it was exempt from said statute, and could not be held liable thereunder without violating the commerce clause and the due process clause of the 14th Amendment to the Constitution of the United States. A demurrer to this answer was interposed and sustained. Upon its refusal to plead further, judgment was entered as above stated. This appeal followed.

The contention of appellant is that the above sections of our statutes have no application to it because it was "work-

ing under employment of the Federal Government in the State of Arkansas". Does that fact exempt it? We think not.

Article 10 of the contract between the Government and appellant requires appellant to "obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work". While this article of the contract is not of controlling importance in determining the question of law presented, it is a declaration that, if the contractor is required by local law to obtain any licenses or permits, it must do so at its own expense and that its status as a contractor with the Government may not exempt it from local law.

Appellant relies upon Osborn *v.* Bank of United States, 9 Wheat. 738. There the Bank was created by an Act of Congress and sought to restrain the State Auditor of Ohio who was attempting to collect a penalty or fine from it because it had established a branch and was doing business in that State without compliance with the banking laws of that State. The injunction was granted in the lower court and sustained in the supreme court. The decision was based upon the distinction there pointed out by Chief Justice Marshall between a "private corporation, engaged in its own business with its own views" and a "public corporation, created for public and national purposes". As to the former, a "mere private corporation", he said it "would certainly be subject to the taxing power of the state, and as an individual would be; and the casual circumstance of its being employed by the Government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of an individual employed in the same manner". As to the Bank it was said: "But the Bank is not such an individual or company. It was not created for its own sake, or for private purposes".

Appellant cites a number of other cases which we have carefully considered, but find them without controlling effect here. We cannot undertake to set them out and point out the distinctions. One of such cases is Gunn *v.* White Sewing Machine Co., 57 Ark. 24. There the point for deci-

sion was whether the appellee, a foreign corporation, was doing business in this State without having complied with our laws. It was held that it was not, but was engaged in interstate commerce. Mr. Justice Battle there quoted from Pembina Min. Co. *v.* Pennsylvania, 125 U. S. 181, as follows: "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce being in the federal government is not to be restrained by State authority." Citing cases. Appellant relies upon the language in the above quotation, "where the corporation is in the employ of the federal government", as being authority for its exemption from our statutes above cited. But we think appellant was not "in the employ of the federal government" in the sense there used. It was under contract with the government and to do a specific job in a certain way, using its own equipment and hiring its own employees, a typical case of independent contractor, and the ordinary relation of employer and employee, master and servant, principal and agent did not exist between it and the government. That it is an independent contractor and is not a government instrumentality there can be no doubt. It was so held in the comparatively recent case of Trinity Farm Construction Co. *v.* Grosjean, 291 U. S. 466, 78 L. Ed. 918, where the appellant unsuccessfully sought to evade the payment of a state excise tax on gasoline consumed by it under a contract with the government, as here, to construct levees on the Mississippi River. See, also, James *v.* Dravo Contracting Co., 302 U. S. 134, 82 L. Ed. 125, 58 S. Ct. 208, to the same effect. In James Stewart & Co. *v.* Sandrakula, 309 U. S. 94, 84 L. Ed. 596, the court, speaking of a contract between Stewart & Company with the government to construct a post office building, said: "While, of course, in a sense the contract is the means by which the United States secures the construction of its post office, certainly the contractor in this independent operation does not share any governmental immunity." Citing the Dravo Contract-

ing Co. case, supra, and Helvering *v.* Producers Corp., 303 U. S. 376.

Appellant says these cases are not in point because they relate to taxes to be paid, either property, excise or privilege, or to state regulations after admission into the state, by a foreign corporation. It is conceded that such taxes are payable and local regulations valid, but that the requirements of the above statutes as to admission into the state are not applicable to a corporation doing work in this state under a government contract, because "the Government might be deprived of desirable bids and agencies for its construction work to its loss, for it is easily conceivable that many corporations might rather forego a particular contract with the Government than domesticate generally under the laws of the state where the work is to be done because of the consequences incident to general domestication, not to mention the cost of domestication which in some states is large." This reasoning does not carry conviction, and we can see no more reason for the power to tax such a corporation under state law than the power to require it to comply with state laws in order to do business in the state and to pay the reasonable fees provided therefor.

Nor can we agree with appellant that the requirements of our statutes above cited, as here construed, render them repugnant to either the commerce clause or the due process clause of the 14th Amendment to the Constitution. Trinity Farm Const. Co. *v.* Grosjean, supra.

The judgment is accordingly affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 190

E. E. MORGAN & COMPANY,

Appellant,

vs.

STATE OF ARKANSAS FOR THE USE AND BENEFIT OF PHILLIPS COUNTY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

WM. M. HALL,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 190

E. E. MORGAN & COMPANY,

Appellant,

vs.

STATE OF ARKANSAS FOR THE USE AND BENEFIT OF PHILLIPS COUNTY.

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

I.

The Supreme Court of Arkansas Did Decide a Federal Question.

The validity of the Arkansas foreign corporation statutes was drawn into question in the Circuit Court and the Supreme Court of Arkansas, upon the ground that they were repugnant to an Act of Congress (Flood Control Act) and the commerce clause of the Federal Constitution and the due process clause of the 14th Amendment as applied to appellant, a foreign corporation having a Government contract under said Act to perform in the State of Ar-

kansas, and the Supreme Court of Arkansas decided the question in holding that appellant was subject to fine under the Arkansas foreign corporation statutes for entering the State of Arkansas and constructing a flood control levee under its contract without getting the State's permission so to do by domesticating under its foreign corporation laws, and expressly holding that the putting of such interpretation upon the statutes did not render them repugnant to the commerce clause and the Act of Congress and the due process clause of the 14th Amendment. There was no other question raised in the case.

That that was a substantial Federal question there can be no doubt under the cases hereinafter referred to.

II.

There is a Substantial Federal Question.

The previous decisions of this Court have not settled the question against appellant's contention. There has really been no case in which the exact question has been presented and decided but there have been statements of this Court in various cases upon the question which appears to have practically settled the question in appellant's favor.

Stockton v. *Boston & N. Y. R. R. Co.*, 32 Fed. 9, involved a corporation in a very similar position. Justice Bradley, on circuit, heard and decided the case. It involved the right of a corporation of one State to go into another State to perform a contract given to it by the Federal Congress and Justice Bradley held that the corporation did not have to get the permission of that State to perform its contract therein.

In *Pembina Silver Min. & Mill. Co.* v. *Pa.*, 125 U. S. 181, 31 L. Ed. 650, the Supreme Court approved Justice Bradley's holding in the *Stockton* case. The *Pembina* case involved the liability of a foreign corporation to the State

of Pennsylvania for a statutory penalty for setting up an office and doing business in that State. And this Court held that the corporation was not within either of the exceptions to the general rule that a corporation of one State can do business in another State only with its permission and was therefore liable for the statutory penalty, but following Justice Bradley in the *Stockton* case, stated that the exceptions from the general rule were where the corporation was in the employ of the Federal Government or where the business was strictly commerce, interstate or foreign.

In *Horn Silver Min. Co.* v. *N. Y.*, 143 U. S. 305, 36 L. Ed. 164, which involved a question similar to that in the *Pembina* case, this Court laid down the same rule.

General Construction Co. v. *Fisher*, 149 Ore. 84, 39 P. (2d) 258, 97 A. L. R. 1252, 292 U. S. 715, 79 L. Ed. 1671, cited by appellee's counsel, did not present the question. The foreign corporation involved in that case was duly qualified under the laws of Oregon to do business therein. The question presented was whether that corporation was liable for a privilege tax based upon its income from a Federal contract which it was performing in the State of Oregon. The Supreme Court of Oregon held the corporation liable for the tax upon the ground that the tax was upon the contractor's property and its use in that State without respect to the name by which the tax was called.

James v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 125, did not involve the question. The foreign corporation in that case had also qualified to do business and the question was its liability for tax based upon its income from its Federal contract, just as in the *Fisher* case.

Trinity Farm Construction Co. v. *Grosjean*, 291 U. S. 466, 78 L. Ed. 918, cited by appellee's counsel, involved the liability of a corporation with a flood control contract, for tax upon gasoline used by it in propelling the machinery with which it was performing the work and this Court held that

the contractor was liable for the tax. The case did not involve the right of a foreign corporation with a Federal contract to enter a State where the work was to be done without domesticating under the foreign corporation laws of that State.

The holding that a Federal contractor was liable for taxes under the laws of the State where the work was being done, casts no light upon the question here, because Chief Justice Marshall in *Osborn* v. *Bank*, 9 Wheaton 738, 868, 6 L. Ed. 204, 234, had long before laid down the rule that a Federal contractor could be taxed upon the property used under the contract but could not be fined for entering a State and working under the contract.

There is, therefore, a difference between the two propositions which must be kept in mind.

Chief Justice Hughes evidently had this in mind when in the *Dravo* case, he said: "The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom of the Government in performing its functions without unduly limiting the taxing power which is equally essential to both nation and state under our dual system."

Realizing that appellant's claim of exemption from fine under the Arkansas statutes, is based upon its Governmental agency, counsel for appellee cite *Trinity Farm Construction Co.* v. *Grosjean ante*, and *James Stewart* v. *Sadrakula*, 309 U. S. 94, 84 L. Ed. 596, as holding that a Government contractor is not a Governmental agency or instrumentality.

In the *Trinity Farm* case the contractor claimed exemption from the gasoline tax on the ground that it was a Governmental agency or instrumentality. This Court held that it was an independent contractor and not a Governmental instrumentality and was, therefore, not exempt from the tax. This was obviously for the reason that the tax had

reference to the contractor's ways and means of doing the work and not to its status with respect to the object of the contract to be accomplished. The decision could have been justified under the rule of the *Osborn* case without that predicate.

In the *Sadrakula* case the contractor predicated upon its Governmental agency or instrumentality its claim of exemption from liability for personal injuries resulting from its failure to provide safety devices required by the local laws and this Court held in effect that it was not a Governmental agency in the sense to exempt it from liability for such injuries under the State law. The reason for the decision was obviously that such a liability relates to the contractor's way of performing its contract, in respect to which the contractor is always considered independent.

A contractor with work to do for the Government under a contract, is an independent contractor with respect to his way and manner of doing his work thereunder, but a Governmental agency or instrumentality with respect to the object to be attained by performance of the contract, and as the Governmental exemption with reference thereto. This is indicated in *Salliotte* v. *King Bridge Co.* (C. C. A. 6) 122 Fed. 378, 65 L. R. A. 620, and *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 84 L. Ed. 554.

Appellant's status was that of a Governmental agent in entering the State of Arkansas and performing the contract, as its action related to the accomplishment of the Governmental object, and not to ways and means of doing the work. Appellant's liability for injuries to persons or property would have been determined by the laws of Arkansas, as they would necessarily have related to its ways and means of doing the work, just as the contractor was held liable in the *Sadrakula* case, but not to being fined for coming into the State and doing the work without having domes-

ticated, because that would relate entirely to the Governmental object of its employment.

This Court held in *Johnson* v. *Maryland*, 254 U. S. 51, 65 L. Ed. 126, under the principle of the *Osborn* case that a State could not make requirements as to the qualifications of Government employees or contractors.

That is the principle invoked in this case. To require appellant to domesticate before performing its contract was to require of it a qualification contrary to the rule of that case.

This case not only presents a Federal question that is substantial but one that is necessarily important to both the Government and Federal contractors and the States wherein the Government does work by contract.

Appellee's motion should be denied. *Alton R. R. Co.* v. *Ill. Commerce Commission*, 305 U. S. 548, 83 L. Ed. 344.

WM. M. HALL,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 190

E. E. MORGAN COMPANY, INC.,
Appellant,

vs.

STATE OF ARKANSAS, FOR USE AND BENEFIT OF PHILLIPS COUNTY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

ELMO TAYLOR,
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DOUGLAS S. HESLEP,
LEO J. MUNDT,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 190

E. E. MORGAN COMPANY, INC.,

Appellant,

vs.

STATE OF ARKANSAS, FOR USE AND BENEFIT OF PHILLIPS COUNTY,

Appellee.

STATEMENT OPPOSING JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Statement of Facts.

This action was brought in the Circuit Court of Phillips County, Arkansas, by the appellee, State of Arkansas, for the use and benefit of Phillips County, against the appellant, E. E. Morgan Company, Inc., to recover the statutory penalty provided for in Section 2251 of Pope's Digest of the statutes of Arkansas. The penalty is for the failure to comply with Sections 2247, 2248, 2249, 2250 of Pope's Digest of the statutes of Arkansas, which provide the manner in which a foreign corporation must qualify to do business in the State of Arkansas.

The appellant admitted that it had done levee construction work in Phillips County, Arkansas during the year 1939, that it was a foreign corporation, organized and existing by virtue of the laws of the State of Mississippi, and

that it had not complied with the Arkansas statutes. However, the appellant stated that the work was done pursuant to a contract between it and the United States and that the Arkansas statutes would not apply. Appellant further alleged that if the Arkansas statutes were applied to it, there would be a violation of the Commerce Clause and the due process clause of the Fourteenth Amendment to the Constitution of the United States. To the answer of the appellant the appellee demurred and the Circuit Court of Phillips County, Arkansas, sustained the demurrer. The Supreme Court of Arkansas affirmed the decision of the lower court which had entered judgment against the appellant in the sum of $1,000.00.

Appellee relies upon the following points in support of its contention that this Court has no jurisdiction of this appeal.

1.

The record fails to show that any Federal question involving the Commerce Clause of the Constitution of the United States was necessarily decided by the Supreme Court of Arkansas.

2.

The record fails to show that any Federal question involving a denial of due process of law was necessarily decided by the Supreme Court of Arkansas.

3.

The record does not present for decision any substantial Federal question. A similar question was presented to this Court in the case of *General Construction Company* v. *Earl L. Fisher, et al.*, 149 Ore. 84, 39 P. (2d) 358, 97 A. L. R. 1252. The appeal in that case from the decision of the Oregon Supreme Court was dismissed by this Court for want of substantial Federal question. 292 U. S. 715, 79 L. Ed. 1671, 55 S. Ct. 646. Rehearing denied, 295 U. S. 768, 79 L. Ed. 1709, 55 S. Ct. 828. The decision in that case was to

the effect that a contract between the United States and an independent contractor for gain for the construction of a dam for the United States does not create an agency or instrumentality of the United States.

This Court has held that a contract between the United States and a private corporation, similar to the contract between the United States and the appellant, does not make such corporation a government agency or instrumentality and does not give such corporation any governmental immunity. *Trinity Farm Construction Company* v. *Grosjean,* 291 U. S. 466, 78 L. Ed. 918; *James* v. *Dravo Contracting Company,* 302 U. S. 134, 82 L. Ed. 125; *James Stewart & Company* v. *Sandrakula,* 309 U. S. 94, 84 L. Ed. 596.

The requirement of the Arkansas statutes as construed by the Supreme Court of Arkansas does not render them repugnant to either the Commerce Clause or the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Trinity Farm Construction Company* v. *Grosjean,* 291 U. S. 466, 78 L. Ed. 918.

The cases offered by the appellant are not in point in any way as to the question in this case.

It would seem that any question under the Fourteenth Amendment or the Commerce Clause, either as respects the acts or the proceedings, is foreclosed by previous decisions of this Court and is so unsubstantial and frivolous as to justify the motion to affirm, if not the motion to dismiss.

Respectfully submitted,

ELMO TAYLOR,
Prosecuting Attorney, First Judicial District of Arkansas,
By (S.) JOHN L. ANDERSON,
Deputy Prosecuting Attorney, Phillips County, Arkansas, and
(S.) DOUGLAS S. HESLEP,
Counsel for the Appellee.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1941

No. 190

E. E. MORGAN COMPANY, INC.,
Appellant,

STATE OF ARKANSAS, FOR THE USE AND BENEFIT OF PHILLIPS COUNTY,
Appellee.

MOTION TO DISMISS THE APPEAL OR AFFIRM THE DECISION OF THE SUPREME COURT OF ARKANSAS.

Now comes the appellee, State of Arkansas, for the use and benefit of Phillips County, and moves to dismiss the appeal herein on the ground that the case presents no substantial Federal question, and appellee further moves, if the motion to dismiss is not granted, that this Court affirm the decision of the Supreme Court of Arkansas on the ground that the questions on which the decision of this cause depends are so unsubstantial as to need no further argument, all as appears in the Statement Opposing Jurisdiction of this Court filed herewith.

Respectfully submitted,

ELMO TAYLOR,
Prosecuting Attorney, First Judicial District of Arkansas,
By (S.) JOHN L. ANDERSON,
Deputy Prosecuting Attorney, Phillips County, Arkansas;
(S.) DOUGLAS S. HESLEP,
LEO J. MUNDT,
Counsel for the Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 190

E. E. MORGAN & CO.,

Appellant,

vs.

STATE OF ARKANSAS, FOR THE USE AND BENEFIT OF PHILLIPS COUNTY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

PETITION FOR REHEARING.

WM. M. HALE,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 190

E. E. MORGAN & CO.,

Appellant,

vs.

STATE OF ARKANSAS, FOR THE USE AND BENEFIT OF PHILLIPS COUNTY,

Appellee.

PETITION OF APPELLANT FOR REHEARING OF MOTION TO DISMISS.

To the Honorable, the Supreme Court of the United States:

Now comes appellant by its undersigned counsel and petitions the Court to rehear and reconsider the motion to dismiss its appeal in the above-styled cause, which the Court, on October 13, 1941, upon a *per curiam* opinion, granted for want of a substantial Federal question.

The court, in its opinion, does not refer to the case of *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, wherein this Court subscribed to the concept, as we understand that decision, that a contractor with a construction contract with the Government to perform, is a governmental agent or instrumentality with respect to the object of the contract

and has the Government's rights and immunities with respect to its accomplishment in accordance with its contract; nor to the case of *Johnson* v. *Maryland*, 254 U. S. 51, wherein this Court, following *Osburn* v. *Bank*, 9 Wheaton 738, 868, held that one employed by the Government to operate a mail truck could not be compelled to qualify under the laws of Maryland to drive a motor vehicle and be fined for driving the truck without having done so, because it was not within a State's powers to require qualifications of a government agent for performance of government work.

A State seems to us certainly to be requiring a qualification of a Government agent when it requires a foreign corporation with a Government contract to perform therein, to qualify under its foreign corporation laws before doing its work, and such a requirement puts certain obstacles in the Government's way of performing work by contract therein. If a State may require domestication of such a contractor under pain of fine, it may also require a Federal contractor under pain of fine to stand an examination before its State Contractors' Licensing Board and obtain a license before performing, which requirements many states now have, and that would lead to more and some intolerable obstacles in the way of the Government doing work by contract through corporate agencies in many cases, especially in emergencies.

It is not apparent how the decision in the case at bar can be reconciled with the principles of the *Yearsley* case and the *Johnson* case.

We have been unable to find any case during all the years since the decision in the *Osburn* case in which it was held that a corporation with a Federal contract to perform had to obtain permission by domestication from the State in which the work was to be done, and we believe the bar at large has understood since that decision, especially since

the Supreme Court's declaration in *Pembina Silver Mining and Milling Co.* v. *Pa.*, 125 U. S. 181, that a corporation did not have to domesticate in another State in order to perform a Federal contract therein, and that the question, therefore, is one of general interest to the bar as well as of importance to contractors and the Government.

Wherefore, we respectfully submit that the court was in error and that the motion should be reheard and the cause be given further consideration.

Respectfully submitted,

WM. M. HALL,
Counsel for Appellant.

I, undersigned counsel for petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WM. M. HALL,
Counsel for Appellant.

No. 190. E. E. MORGAN CO., INC. *v.* ARKANSAS FOR USE AND BENEFIT OF PHILLIPS COUNTY. Appeal from the Supreme Court of Arkansas. October 13, 1941. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 105; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149; *General Construction Co.* v. *Fisher*, 295 U. S. 715; *Trinityfarm Construction Co.* v. *Grosjean*, 291 U. S. 466, 472; (2) *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 588–

*MR. JUSTICE ROBERTS took no part in the consideration and decision of the orders announced on January 5th.

For decisions on applications for certiorari, see *post*, pp. 587, 606; for rehearing, *post*, pp. 704, 706. For cases disposed of without consideration by the Court, *post*, p. 701.

89; *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 306–7. *Mr. Wm. M. Hall* for appellant. *Mr. Leo J. Mundt* for appellee. Reported below: 202 Ark. 404, 150 S. W. 2d 736.